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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 751,
Petitioner,
v.
BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Do Article III standing requirements preclude a federal court from giving effect to Congress' express statutory authorization permitting an exclusive "representative" of the "affected employees" to assert the monetary claims of the represented "affected employees" under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 50 F.3d 1426 and is reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at pp. 1a-12a. The Order of the Court of Appeals denying the Union's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at Pet. App. 20a. The opinion of the United States District Court for the Eastern District of Missouri granting defendant Brown Group, Inc.'s Motion to Dismiss is reported at 820 F. Supp. 1192 and is reprinted at Pet. App. 13a-15a. The opinion of the District Court denying the Union's Motion to Alter or Amend the Judgment is unreported and is reprinted at Pet. App. 16a-19a.

JURISDICTION

The Eighth Circuit issued its decision and judgment herein on April 3, 1995. The court below then denied a timely Petition for Rehearing and Suggestion for Rehearing En Banc on May 25, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Worker Adjustment and Retraining Notification Act ("WARN") provide:

§ 2(a)(4), 29 U.S.C. § 2101(a)(4):

> the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45.

§ 3(a), 29 U.S.C. § 2102(a):

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—
>
> (1) to each representative of the affected employees as of the time of notice or, if there is no such representative at that time, to each affected employee. . .

§ 5, 29 U.S.C. § 2104:

> (a)(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—
>
> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

> (ii) the final regular rate received by such employee; and
>
> (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred. . . .
>
> (5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.
>
> (b) The remedies provided for in this section shall be the exclusive remedy for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

STATEMENT OF THE CASE

The Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101-09, provides that covered employers may not order a "plant closing or mass layoff," as statutorily defined (29 U.S.C. § 2101(a)(2) & (3)), without providing notice sixty days beforehand "to each *representative of the affected employees* at the time of the notice or, if there is no such representative at that time, to each affected employee." 29 U.S.C. § 2102(a) (emphasis supplied). "Representative" is defined in the statute as "an exclusive representative of employees within the meaning of section 159(a) or 158(f) of [the National Labor Relations Act (NLRA)] . . ."

The WARN Act goes on to provide (a) that if an employer "orders a plant closing or mass layoff in violation of section 2102," the employer is liable "to each aggrieved

employee who suffers an employment loss" for back pay and benefits, (29 U.S.C. § 2104(a)(1)); and (b) that "a person seeking to enforce such liability, *including a representative of employees* . . . aggrieved under paragraph (1) . . . may sue" in district court (29 U.S.C. § 2104(a)(5) (emphasis supplied)).

On January 17, 1992, Brown Group, Inc. d/b/a Brown Shoe Co. ("Brown Shoe") mailed a written notice to William R. Treece of the United Food and Commercial Workers International Union ("International") which announced that Brown Shoe's Dixon, Missouri plant would permanently close and 277 employees would be discharged as a result of the closing. Brown Shoe stated in the letter that the Company would begin discharging employees on March 20, 1992. Brown Shoe already had begun discharging employees before sending the January 17 notice, discharged additional employees on January 20, 1992, and continued to discharge employees during February and March, 1992. Joint Appendix ("J.A.") 9.[1]

On June 16, 1992, United Food and Commercial Workers Union Local 751, Missouri ("Local 751" or the "Union"), petitioner herein, filed a complaint in the United States District Court for the Eastern District of Missouri, alleging that Local 751 was the "exclusive representative of the [Dixon] employees" on January 17, 1992, and at all other times material to the complaint, as defined in 29 U.S.C. § 2101(a)(4). Jurisdiction was alleged under 28 U.S.C. § 1331 and 29 U.S.C. § 2104(a). A copy of the then current collective bargaining agreement between Local 751 and Brown Shoe was attached to the complaint. The Union also alleged that it was Local 751, not William Treece or the International, that had a right to notice of the Dixon closing sixty days before the closing was ordered in accordance with 29 U.S.C. § 2102(a)(1), and that Brown Shoe had in any

[1] Because the courts below dismissed this case on the pleadings, the facts are recited as they appear in the complaint.

event failed to continue the employment of most of the represented employees for a sixty-day period following the notice. An appendix to the complaint identified those Dixon employees who are aggrieved employees under 29 U.S.C. § 2104(a). J.A. 7-10 (Complaint); 11-61 (Collective Bargaining Agreement); 62-63 (Brown Shoe Letter); 64-73 (List of Employees).

The complaint demanded that: (1) Brown Shoe pay each aggrieved employee back pay and fringe benefits for each day of employment loss the employee suffered prior to the expiration of the sixty-day notice period; (2) Local 751 recover from Brown Shoe the cost of this action, including reasonable attorneys' fees; and (3) Local 751 recover such other and further relief on its behalf and that of the aggrieved employees as may be proper. J.A. 9-10.

On April 12, 1993, the District Court issued a memorandum and order granting Brown Shoe's motion to dismiss on the ground that the Union lacked standing to sue for damages for the represented employees. Pet. App. 13a. Local 751 thereupon filed a motion to alter or amend judgment asking leave to file an amended complaint seeking declaratory relief and adding the affected employees as parties. That motion was denied by the District Court on March 7, 1994. Pet. App. 16a.

On appeal, the Eighth Circuit affirmed the District Court's standing ruling. The Court of Appeals recognized that Local 751 is a statutory "representative" of the aggrieved employees. But the court below held that while the Union "is entitled to bring suit under the WARN Act, [] it does not necessarily follow that the union has standing." Pet. App. 4a.

The Court of Appeals went on to hold that although the failure to provide an adequate, timely notice to Local 751, as required by the statute, may "allege[] an injury to the union itself . . . that is concrete and actual" (Pet. App. 6a), the Union does not have standing on that

basis. The statutory remedy for inadequate notice to the Union—back pay and benefits for aggrieved employees—said the Eighth Circuit, "would do nothing to remedy the alleged failure of notice to the UFCW." Pet. App. 7a. The court below, moreover, concluded that Local 751 did not have standing to assert the right of the employees the Union represents to monetary relief, relying on the third prong of the associational standing test articulated in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)—*viz.*, whether "the claim asserted [or] the relief requested requires the participation of individual members in the lawsuit." Pet. App. 9a-11a. Finally, the Court of Appeals affirmed the district court's denial of leave to amend the complaint. Pet. App. 11a-12a.

SUMMARY OF ARGUMENT

I. Where a standing issue arises in a federal case between two *private parties* the pertinent question—and the only pertinent question—is whether the case will be "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). In making this determination, the initial task in a case brought under a statute is to determine whether the statute itself authorizes the plaintiff to bring a lawsuit of the kind before the court.

Here, the WARN Act specifically authorizes unions as exclusive representatives of the affected employees to bring suit where the employer fails to provide the notice *to the union* mandated by the statute in the event of a plant closing or mass layoff, and specifically provides as the only remedy to the union in such a lawsuit recovery on behalf of the represented employees of statutory monetary payments. Those payments are in the nature of liquidated damages, designed in part to deter employer violations and in part to compensate the group of employees represented by the union for the lost opportunity to respond effectively to the plant closing or mass layoff. Providing monetary relief payable to the affected employees where the union sues for a violation suitably redresses the injury to the union by reason of the violation since that right was created to facilitate the union's role in aiding and assisting the represented employees adversely affected by the closing or layoff.

Given this statutory structure, there is no doubt that the union in this case has standing. Where there is a specific statutory grant of litigating authority such as that here, the only pertinent standing limitations are those derived directly from Article III of the Constitution. *Warth v. Seldin*, 422 U.S. 490, 500-501 (1975). The bedrock Article III requirement is that the litigant "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The WARN Act statutory scheme alone is sufficient to demonstrate that each aspect of this Article III standard is met here.

In particular, where there is a common law or statutory legal duty owed to the plaintiff which will, if carried out, enable the plaintiff to advance a third party's interests, and the defendant breaches that duty, the law recognizes that a suit by the plaintiff pursuing relief, monetary, individualized, or otherwise, that redounds to the financial benefit of the third party is one that is appropriate for judicial resolution. Third party beneficiary cases, for example, have precisely that structure, as do cases in which the government is accorded statutory authority to sue for relief for individuals and cases brought by unions under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to recover for represented employees the wages and working conditions provided for in a collective bargaining agreement on an employer breach of the agreement. *International Union UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 699-700 (1966). In all of these in-

stances, given the precise nature of the legal duty owed to the plaintiff and the consequent injury caused by its breach, it has always been recognized that monetary relief for the benefit of third parties *will* redress the plaintiff's legal injury for the purposes of the standing doctrine.

II. The Eighth Circuit in analyzing this case ignored the point that the employer's legal duty ran to the union, not to the affected employees individually. As just noted, that point decides this case. Even on its own terms, however, the Eighth Circuit was wrong. The statutory designation of unions as representatives authorized to bring a WARN Act suit on behalf of affected employees (as well as for many other purposes under both this statute and the federal labor laws) is one of those designations—recognized as proper in the federal courts—"by statute or the settled practice of the courts, [through which] the plaintiff is permitted to sue for the benefit of another." *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406 (1900). Such designations are typically bounded by common law or statutory criteria governing the appointment of the representative as well as by some duty of the kind imposed on fiduciaries to provide for adequacy of representation. The WARN Act designation of unions which are representatives of employees under the federal labor laws as statutory representatives under the WARN Act itself shares those characteristics. That being so, all the requirements recognized in this Court's standing jurisprudence are met in this case.

Against this background, the Eighth Circuit erred in treating this case as part of the "associational standing" line of cases. Those cases are only one subcategory of the larger category of "representational standing" cases. Associational standing is concerned with the situation in which the association in question has not been recognized as a representative for litigation purposes by any statutory or common law scheme, but relies instead on the voluntary relationship between the association and its members for authority to represent its members in litigation. It is

only in the associational standing cases that the Court has been required to develop its own prudential criteria as to when such implicit representation will be recognized. When, as here, the authorization to bring suit is made by law rather than by self-designation, those criteria have no application. Rather, in the authorized representative cases the standing question comes down to whether the represented individuals have suffered an injury in fact. And the WARN Act statutory scheme shows that the answer to that question is "yes."

ARGUMENT

Introduction

Last term, this Court summarized the substantive and enforcement provisions of the WARN Act as follows:

> With some exceptions and conditions, WARN forbids an employer of 100 or more employees to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2102(a). The employer is supposed to notify, among others, "each affected employee" or "*each representative of the affected employees.*" 29 U.S.C. § 2102(a)(1). An employer who violates the notice provisions is liable for *penalties* by way of a civil action that may be brought "in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business," § 2104(a)(5). The class of plaintiffs includes aggrieved employees (*or their unions, as representatives*), *ibid.*, who may collect "back pay for each day of violation," § 2104(a)(1)(A), "up to a maximum of 60 days," § 2104(a)(1). [*North Star Steel Co. v. Thomas*, —— U.S. ——, 115 S. Ct. 1927, 1929 (1995) (emphasis supplied).]

As this summary indicates, the WARN Act establishes an interrelated scheme of substantive requirements and enforcement provisions specifically providing that unions chosen as employee representatives pursuant to the federal

labor laws governing collective bargaining retain that representative role for WARN Act purposes, *including* for purposes of bringing suits that provide the statutory "back pay" remedy for violation of the notice provision. *See* 29 U.S.C. § 2101(a)(4) (defining "representative" as "an exclusive representative of within the meaning [the National Labor Relations Act] or the [Railway Labor Act].")

The statute itself on its face thus provides a specific Congressional answer to the fundamental question raised by the standing inquiry in the federal courts, *viz.*, "whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). The issue presented by this case is whether, as the Eighth Circuit held, Congress is on some basis precluded by the "case or controversy" requirement of Article III of the Constitution from so providing.

In *North Star Steel*, of course, this Court proceeded on the understanding that there is *no* such limitation on Congress' authority to structure a statutory scheme along the lines of the WARN Act for delineating rights and duties and prescribing remedies and enforcement procedures. One of the two consolidated cases there was brought by a union and sought to recover the applicable statutory monetary relief for the employees the union represented. *Crown Cork & Seal Co. v. United Steelworkers of America*, Supreme Court No. 94-835. Yet the Court suggested no disquiet with the union's standing in its opinion even though the standing issue had been raised at oral argument (1995 WL 311715, Oral Argument, at p. 11) and would, of course, have been jurisdictional if meritorious. *See National Organization for Women Inc. v. Scheidler*, —— U.S. ——, 114 S. Ct. 798, 802 (1994).

That understanding could not have been more correct. The instant case, on its face—and, as we will show, at its core--is a straightforward "case or controversy" of a kind long recognized by the law.

The plaintiff union, a private party, has, by reason of its status, a federal statutory right to a notice from the defendant employer, also a private party, when the defendant formulates an intent to act in a manner that affects the plaintiff's interests. The notice is designed to enable the plaintiff to respond by initiating a course of conduct that protects and advances those interests. The complaint here alleges that the defendant formulated the requisite intent—and, indeed, acted on it—and that the defendant did so without providing the plaintiff the requisite notice, thereby violating the plaintiff's statutory rights and causing the plaintiff legal injury. And, the complaint seeks the remedy the statute provides to redress such violations.

This case is thus a classic private lawsuit for a specific, concrete violation of a statutorily created right. It is not a lawsuit raising a constitutional claim or a challenge to government action that diverges from the historic "case or controversy" paradigm and by reason of that divergence tests the limits of our litigation system, or of our tripartite government structure, or of our federalism. Indeed, in this case, any separation of powers concerns cut squarely in the direction of *upholding* Congress' legislative power to create the entirely rational scheme for enforcing a statutory obligation running from one set of private parties to another. *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (since "Congress is a co-equal branch of government" the Court "accords 'great weight to the decisions of Congress'" when those decisions are constitutionally challenged).

The only complexity here is that the private, statutory right in question runs to the plaintiff as—and because of—its status as a *representative* of a discrete group of individuals—the defendant's employees—and that precisely because of the representative nature of the notice right and the employee protective purpose served by that right, the sole statutory remedy for the violation takes the form of required monetary payments by the defendant to those employees.

The courts below proceeded on the theory that Article III of the Constitution generates two absolute rules: (a) that lawsuits brought by A, a rights holder, against B, an alleged violator of A's rights, in which monetary relief on a finding of a violation is payable to C (or to C, D, E, etc.) are not justiciable "cases or controversies" because A lacks standing to prosecute the case; and (b) that Congress cannot, consistent with the standing requirement, designate a representative with authority to litigate on behalf of a group of individuals where the relief is monetary payments to those individuals.

The Eighth Circuit's conclusion in each of these regards is contrary to the continuous recognition in numerous legal contexts that such lawsuits through authorized representatives *are* justiciable "cases or controversies" and is wholly without foundation in this Court's "standing" jurisprudence. Very simply stated, where Congress creates a cause of action and provides a remedial scheme for violations like that here, providing for litigation through an authorized representative who itself is owed duties under the statute, the Congressional enactment itself is sufficient to establish the plaintiff's Article III standing.

I. The Plaintiff Union Has Article III Standing To Bring This WARN Act Suit, And To Seek The Monetary Remedy To Employees The Act Decrees, By Reason Of The Express Statutory Grant To The Union Of Litigating Authority To Vindicate The Union's Express Statutory Right To A Plant Closing Notice, And The Representational Nature Of That Notice Right.

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. . . . [*Warth v. Seldin*, 422 U.S. 490, 498 (1975).]

As such, the analytic distinction made in *Flast, supra*, 392 U.S. at 94-95 is very much in point here:

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case- and-controversy doctrine.

Because this is a federal case between two private parties and concerns an alleged violation of a federal statutory norm that is plainly a norm Congress has the Commerce Clause power to enact, the challenge to the plaintiff's standing is to be tested against whether the plaintiff's claim is presented in "an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast, supra*, 392 U.S. at 95.

A. The resulting Article III standing question does not arise—and is not to be considered—in the void, and without regard to the plaintiff's particular cause of action. Rather, as this Court has emphasized, any "inquiry as to standing must begin with a determination of whether the statute in question authorizes [the remedy sought] at the behest of the plaintiff." *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). *See also International Primate Protection League v. Administrators of Tulane Education Fund*, 500 U.S. 72, 77 (1991), *quoting* Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988) ("standing is gauged by the specific common-law, statutory or constitutional law claims that a party presents [and] 'should be seen as a question of substantive law, answerable by reference to the statutory . . . provision whose protection is invoked.' ").[2]

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[2] *See also* Fletcher, *The Structure of Standing, supra*, at 251 ("In the case of a statutory right, Congress is the source both

The statutory standing inquiry in federal cases is primary for three reasons:

First, only if Congress intended to permit the particular plaintiff to litigate the particular lawsuit does the plaintiff have standing, regardless of what the standing doctrine would otherwise permit. To put this another way, only where Congress has such an intent does any Article III question arise. *See, e.g., Director, Office of Workers' Compensation v. Newport News Shipbuilding & Drydock Co.*, —— U.S. ——, 115 S. Ct. 1278, 1286 (1995) (government official does not have standing to seek judicial review of an agency decision because the relevant statute does not so provide, even though "Congress *could* have conferred standing upon the Director without infringing Article III of the Constitution").

Second, statutory grants of litigating authority regarding a particular dispute "assume[] critical importance with respect to [the set of judge-made rules this Court has recognized and labelled] the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes." *Warth, supra*, 422 U.S. at 500.

To take an example directly relevant here, one of these nonconstitutional, "self-imposed, prudential limitations" is that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests . . ." *Warth, supra*, 422 U.S. at 44. At the same time, however, this Court has made it equally plain that where the Article III injury-in-fact minima are met, "the question whether the litigant is a 'proper party to request an adjudication of a particular issue' (*Flast v. Cohen, supra*, 392 U.S. at 100), is one within the power of Congress to determine," (*Sierra Club v. Morton, supra*, 405 U.S. at 732 n.3). *See also Warth, supra*, 422 U.S. at 501 ("[S]o long as this requirement [of a 'distinct and palpable injury'] is satisfied, persons to whom Congress has granted a right of action . . . may have standing to seek relief on the basis of the legal rights and interests of others"); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules' . . .")

Once it is determined that Congress has specifically authorized a particular class of lawsuits to go forward at the behest of a particular class of plaintiffs, then, the prudential standing limitations—such as the one implicated by the "proper party to request an adjudication" inquiry—drop out of the equation and the only pertinent standing principles are those that rest directly on the "case or controversy" requirement of Article III of the Constitution.

Finally, and as already foreshadowed, the legal rights, duties and remedies created by a federal statute form the stuff out of which the Article III principles emerge. Statutes shape the minimum, Article III injury-in-fact requirement, by, to take the most basic example, "creating legal rights, the invasion of which creates standing." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Warth, supra*, 422 U.S. at 500; *Havens Realty v. Coleman*, 455 U.S. 363, 373 (1982). Similarly, the related constitutional inquiry concerning whether the injury in question is likely to be redressed through the litigation turns on the nature and purpose of the remedial scheme established by the statute in question. *See Director, Office of Workers' Compensation, supra*, 115 S. Ct.

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of the legal obligation and of the definition of the class of those entitled to enforce it . . . So long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them . . ."); Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, XVII Suffolk L. Rev. 881, 885 (1983) (the "existence [of standing] in a given case is largely within the control of Congress. . . . [L]egal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature.")

at 1286, citing and relying on *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 325 (1980) (statutes, such as Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2, that explicitly permit governmental standing to pursue a statutory violation in the public interest and provide for monetary relief payable to individuals do not infringe Article III).

B. All the foregoing being so, we turn to an analysis of the WARN Act and of its litigation scheme.

The WARN Act became law in 1988, long after the federally-created-and-regulated system governing employee workplace representation through a union was in place. The WARN Act added to the preexisting law limited statutory rights concerning plant closings and mass layoffs, actions which effectively terminate the employees' employment tenure and any collective bargaining agreement entered into on the employees' behalf by their exclusive representative. In making that addition, Congress determined that where the workforce has chosen an exclusive representative for collective bargaining as provided for in the National Labor Relations Act (NLRA) or Railway Labor Act (RLA) and a closing or mass layoff occurs, the protection of employee interests should continue to be entrusted to the statutory representative otherwise responsible for representing the employees with regard to their employment.

(1) *Statutory Representative*: The WARN Act therefore defines "representative" as the exclusive representative chosen by employees pursuant to the National Labor Relations Act or Railway Labor Act. 29 U.S.C. § 2101 (a)(4).

Such statutory representatives are "designated or selected [by the employees] in a unit appropriate for such purposes . . . for the purposes of collective bargaining in respect to rate of pay, wages, hours of employment, or other conditions of employment" and, as noted above, are the "exclusive" representative for such purposes. NLRA § 9(a), 29 U.S.C. § 159(a); *see also* RLA § 2, *Fourth*, 45 U.S.C. § 152, *Fourth*. The process for designating the exclusive representative—free selection by a majority of the employees, normally in a governmentally supervised secret ballot election—is specifically provided for by statute and administered by the National Labor Relations Board (and, in the case of the RLA, by the National Mediation Board). NLRA § 9, 29 U.S.C. § 159; RLA § 2, *Ninth*, 45 U.S.C. § 152, *Ninth*. It is therefore an unfair labor practice under the NLRA for an employer to recognize as an exclusive representative a union that has *not* been selected by the majority of the employees (NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2); *see also* RLA § 2, *Third & Fourth*, 45 U.S.C. § 152, *Third & Fourth*).[3] And, once a union is selected as an exclusive representative, the union owes the employees it represents a duty of fair representation, akin to the duty of a fiduciary or trustee to the individuals the fiduciary represents. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74 (1991) ("a union owes employees a duty to represent them adequately as well as honestly and in good faith"); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Conley v. Gibson*, 355 U.S. 41, 42 (1957).[4]

[3] Under NLRA § 8(f), 29 U.S.C. § 158(f), in the construction trades a union can be recognized as the exclusive collective bargaining representative before it is selected by a majority of the employees, but employees may petition at any time for a representation election under § 9(a). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982).

[4] The WARN Act itself does not, to be sure, create any duty inhering in unions to file a 29 U.S.C. § 2104 suit alleging an employer violation and seeking the statutory remedy. Rather, the employees are free to file such a suit themselves. And, where employees are free to pursue their own interests in court, we are not aware of any cases in this Court holding that the duty of fair representation requires the union to bring suit, even where the construction of the applicable collective bargaining agreement is at stake.

The standing issue posed by this case, however, arises only when the union does bring suit in federal court. And, the developed law is that unions that are exclusive representatives and *do* undertake to exercise their representational authority on matters as to which that authority is nonexclusive *are* subject to the duty of fair representation in carrying out the representation affirmatively

Thus, a union's representative status under the WARN Act flows not from some internal associational relationship with its own members, but from its separate governmentally-established status as the "representative" for all the employees in a particular "appropriate bargaining unit."

(2) *Role Of The "Representative"*: After defining representative" for purposes of the WARN Act as the NLRA/RLA exclusive representative, Congress provided that employees who have a union representative are to receive the statutory notice of a plant closing or mass layoff *through notice to that representative*, rather than through notice to each employee individually. 29 U.S.C. § 2102(a)(1).

Supporters of the WARN Act repeatedly stressed that notice would provide employees with the opportunity for involvement in retraining and reemployment programs, both of which, studies showed, are more effective when instituted while the employees are still available as a group at the plant. *See, e.g.*, S. Rep. No. 62, 100th Cong., 1st Sess. (1987) at 12 (stressing that the primary purpose of notice is "to enroll workers in adjustment programs before they are laid off", while receipt of notice by individual employees who have no opportunity to participate in an organized program is only of limited value). *See also* H.R. Rep. No. 285, 100th Cong., 1st Sess. (1987), at 13 (same). The WARN Act proponents added that where there is union representation, such programs are much more likely to be instituted and to succeed if the union is an active participant. 133 CONG. REC. S9391 (daily ed. July 8, 1987) (remarks of Sen. Metzenbaum) ("It is easier to enroll workers in adjustment programs before they lose their jobs. It is easier to enlist

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undertaken. *Foust v. International Bhd. of Elec. Workers*, 572 F.2d 710, 717 (10th Cir. 1978), *rev'd in part on other grounds*, 442 U.S. 42 (1979); *Nedd v. United Mine Workers*, 556 F.2d 190, 200 (3rd Cir. 1977) *cert. denied*, 434 U.S. 1013 (1978); *cf. Toensing v. Brown*, 528 F.2d 69, 70 (9th Cir. 1975); *Kesner v. NLRB*, 532 F.2d 1169, 1175 (7th Cir.), *cert. denied*, 429 U.S. 983 (1978).

unions and management as active participants before the plant or department store or other facility goes down").

Additionally, although the bill as finally passed did not mandate any form of consultation by the employer with employees or with their representatives regarding the plant closing beyond that required under the National Labor Relations Act, Congress recognized that even sixty days notice might in some instances provide an opportunity for negotiations concerning economic concessions or employee buyouts. S. Rep. No. 62, *supra*, 12 ("with time to plan ahead, it is sometimes possible to avoid layoffs altogether"). Again, where the employees have a union representative, such discussions are properly, under the National Labor Relations Act, conducted with the union, not with individual employees. *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U.S. 678 (1944).

As the foregoing indicates, Congress concluded that where there is a union representative, WARN Act notice is to be provided to the representative so that the union can assist employees in developing a coordinated, collective response to their common situation that mitigates the adverse impact of the plant closing on those employees.

(3) *Statutory Remedies*: Where the employer does not meet the obligation to provide sixty-days notice to the exclusive representative, Congress provided that the employer, for "violation of section 2102"—the section requiring notice to the union and not to the employees where there is an exclusive representative—shall be liable to "each aggrieved employee" for a statutorily-prescribed monetary amount measured by each employee's rate of pay and by the period of the violation. 29 U.S.C. § 2104(b). Thus, it is absolutely clear in the statute that in a case like this one the liability to individual employees is *the* statutory remedy for failure to provide notice *to the union representative*, and that no other rem-

edy is available to the union where the employer does not provide the requisite notice to the union.[5]

A predecessor to the WARN Act, reported by the House Committee on Education and Labor in 1985 but defeated on the floor (H.R. REP. No. 285, 100th Cong., 1st Sess. 12 (1988)), had provided expressly for the imposition of general or punitive damages. *See* H.R. REP. No. 336, 99th Cong., 1st Sess. 24 (1985); *see* 131 CONG. REC. H10213 et seq. (daily ed. Nov. 14, 1985) (eliminating general and punitive damages). The WARN Act as ultimately enacted, however, contains no such provision.

Similarly, provisions for injunctive relief contained in the 1985 version of the bill as reported (*see* H.R. REP. No. 99-336, *supra*) were deleted in the legislative process. *See* 131 CONG. REC. H10213 *et seq.* (daily ed. Nov. 14, 1985) (eliminating injunctive relief); Hearings on H.R. 1122, 99th Cong., 2d Sess. 139-40, 144-47 (1987) (remarks of Reps. Ford and Clay). Indeed, the final bill was amended shortly before enactment to make it absolutely clear that no injunctive relief is available. 29 U.S.C. § 2104(b) ("Under this Act, a Federal court shall not have authority to enjoin a plant closing or mass layoff"). *See* 134 CONG. REC. S8605 (daily ed. June 27, 1985) (remarks of Sen. Hatch) (demanding greater clarity regarding the unavailability of injunctions); S. 8610-1 (introduction by Sen. Hatch of amendment explicitly prohibiting injunctions and acceptance of the amendment).

The WARN Act's exclusive "back pay" remedy is, moreover, quite different from the back pay remedy provided by statutes such as Title VII and the National Labor

[5] In addition to notice to the union (or to the employees individually if there is no union representative), the WARN Act provides that notice must also be given to the "State dislocated worker unit" and to the chief elected official of that local government unit. 29 U.S.C. § 2102(a)(2). For violation of that obligation WARN provides for a "civil penalty" of $500 for each day of the violation. 29 U.S.C. § 2104(a)(4).

Relations Act. The prescribed rate of pay may be higher than the amount the employee would have received during the notice period. 29 U.S.C. § 2104(a)(1)(A)(i) & (ii) (the rate of compensation used to calculate liability is the "higher of" the average rate for the last three years or the final regular rate). There is no offset against that amount for the employee's actual earnings. *Id.* And, there is no requirement of employee mitigation of damages. *Id. Compare* 42 U.S.C. § 2000e-5(g) ("Interim earnings or amounts earnable with reasonable diligence" by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197-98 (1941) (same mitigation rule under the NLRA). An employer payment of contractually-required severance payments, moreover, does not serve to reduce the statutory amount due. 29 U.S.C. § 2104(2).

It is also clear, from the remedial provisions themselves as well as from the pertinent legislative history, that Congress imposed this monetary liability to induce compliance with the notice requirements, in a manner akin to an equitable remedy.

Congress' aim in these unusual provisions was to enact what "is in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate damages proceedings." S. REP. No. 62, *supra*, 24. *See also* H.R. REP. No. 285, *supra*, 16 (the statute provides "economic incentives to encourage employers to provide early notification of mass layoffs and plant closings"); H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 1053 (1988) (describing employers' monetary liability to employees for violation of the notice provisions in detail, noting in particular that contractually-required severance payments are not offset because "[t]hese are benefits that are payable as compensation for past

services" and permitting an offset would not serve to deter statutory violations).[6]

Of particular note in this regard is the fact that the Senate rejected an amendment which would have explicitly provided that an employer can satisfy the statutory requirements by providing voluntary severance pay in lieu of notice. Before the vote rejecting the amendment, the primary supporter of the bill explained:

> We are not seeking to get workers paid because their plant is closing. We are trying to get them retrained. We are trying to put them back into the mainstream of the job market. If we wait to tell people they are losing their jobs until the day of the job loss, then . . . 75 percent will drift away without ever getting counseled or trained for a new job . . . [W]e just want notice. We are not asking for money. . . . *Our bill is about notice, not severance. And that is the key point.* [134 CONG. REC. S8548 (daily ed. June 25, 1988 (remarks of Sen. Metzenbaum, emphasis supplied); *see also id.*, S. 8693 (remarks of Sen. Metzenbaum) ("The Senator stands on the floor of this body to make it clear, that we are not looking for money, we are looking for fairness. We are looking for the decent thing to be done. We are looking to give the employees a chance to work.").]

As this Court in *North Star Steel* put it, echoing many members of Congress (both supporters and opponents of the final bill), the statutory monetary liability provisions

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[6] The WARN Act was originally a part of the Omnibus Trade Act, which was vetoed by the President. *See* H.R. Doc. No. 200, 100th Cong., 2d Sess. (1988), *reprinted in* 134 Cong. Rec. 12,130 (1988). The plant closing provisions were then separately reintroduced and passed (with a few minor amendments not here relevant). The principal sponsor of the WARN Act stated on the floor that the Conference Report on the Trade Act sets out Congress' intent in enacting the WARN Act. 134 Cong. Rec. 13,680-81 (1988) (remarks of Rep. Ford); *see also* 134 CONG. REC. H5504 (daily ed. July 13, 1988) (remarks of Reps. Jeffords and Clay).

in a sense provide for civil "penalties". 115 S. Ct. at 1929; *see, e.g.*, S. REP. No. 62, *supra* ("Penalties are provided for failure to comply with [the notice provisions]"); *id.* at 24 (purpose of employee liability provision is "to penalize the wrongdoing employer"). At the same time, because the remedy is a form of back pay, at other points in the legislative history the required monetary payments are referred to as "damages." 134 CONG. REC. S8375 (daily ed. June 22, 1988) (remarks of Sen. Kennedy); 134 CONG. REC. H5512 (daily ed. July 13, 1988) (remarks of Rep. Gaydos).

Whatever the locution, the basic point is that a purpose of the back pay remedy provision is to further the statutory aim of securing proper notice in the same way as the separate payments-to-government-officials-for-failure-to-provide-notice provision, explicitly labeled a "civil penalty" in the Act, 29 U.S.C. § 2104(a)(3). *See* H.R. CONF. REP., *supra*, at 1052-53 (characterizing the two forms of monetary liability provided for in the Act as "[d]amage payments to employees" and "damage payments to local governments").

That being so, Congress crafted the monetary-payment-to-employees provision to provide a simplified form of recompense for the affected employees' lost opportunity to respond to the notice by participating in effective retraining and reemployment programs or by seeking to reverse the plant closing decisions. The result is a provision for monetary payments in the event of a statutory violation which are easily calculated largely without painstaking inquiries into each individual employee's circumstances.

Additionally—since the impact of the violation on the employees and the deterrent effect on employers is the same in both situations—Congress also provided that the form of relief should be the same where the employees have a union representative as where they do not. Given the legislative determination not to provide an injunctive remedy or a legal damages remedy, the choice Congress

made in this regard was all but foreordained. Providing no statutory remedy where the notice is to the union would obviously make the statute a dead letter in that class of situations. And, providing monetary relief payable to the union itself where the union sues, but monetary relief to unrepresented employees where there is no union or where the employee sues, would appear to provide a windfall to the union. At least equally to the point, providing monetary relief payable to the affected employees where the union sues for a violation (as well as where unrepresented employees sue) suitably redresses the injury to the union by reason of the violation since the notice right was created to facilitate the union's role in providing "mutual aid and assistance" (NLRA § 7, 29 U.S.C. § 157) to represented employees in a plant closing or mass layoff situation.

(4) *Litigating Authority*: After specifying how "*such liability*"—plainly referring to the very monetary liability just described—shall be calculated (29 U.S.C. § 2104 (a)(1)), the WARN Act then goes on to provide that "*such liability*" can be enforced in court by, *inter alia*, "a representative of employees . . . aggrieved under paragraph (1)," as well as by the employees themselves.

This concurrent permission to the statutory representative and employees to bring suit—which was in both the House and Senate bills as introduced (134 CONG. REC. S538 (daily ed. Feb. 19, 1987) (§ 205(a)(3) as introduced); 134 CONG. REC. H1122 (daily ed. Feb. 18, 1987) (§ 355(a)(2) as introduced)), and which drew no elucidating comment during the ensuing legislative process—precisely parallels the rule that applies under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. That comes as no surprise, since the overall structure of the WARN Act closely parallels that of LMRA § 301 with regard to the role of the union as exclusive representative.

LMRA § 301(b) provides quite generally that "Any such labor organization may sue or be sued as an entity *and in behalf of the employees whom it represents* in the

courts of the United States." 29 U.S.C. § 185(b) (emphasis supplied). In *International Union UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 699-700 (1966), this Court held that a union which—as an exclusive representative pursuant to the same NLRA provisions incorporated in the definition of "representative" in the WARN Act—negotiates a collective bargaining agreement may bring suit "to recover wages or vacation pay claimed by its members pursuant to [the] . . . contract." 383 U.S. at 699. At the same time, as *Hoosier Cardinal* expressly recognized, under the rule of *Smith v. Evening News Assn.*, 371 U.S. 195 (1962), individual employees may sue for the same individual monetary relief (unless precluded by grievance-arbitration provisions of the agreement itself, *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965)). Thus, the LMRA § 301

> [c]ase law . . . sets this guiding principle: when a claim derives from a collective bargaining agreement . . . the labor organization is *an* appropriate party (although not the *only* appropriate party) to vindicate employees' rights. . . An employee's 'personal rights' may be vindicated *either* by the union *or* by the employee herself. [*Office and Professional Employees Int'l Union, Local 2 v. F.D.I.C.*, 962 F.2d 63, 66 & n.6 (D.C. Cir. 1992) (R. Ginsburg, J.).]

See also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562 (1976).

The WARN Act, as we have seen, extends the authority of unions as exclusive representatives beyond enforcing collective bargaining agreements to enforcing WARN Act notice rights. Like the National Labor Relations Act and the Railway Labor Act, the WARN Act provides that as to certain matters—there, negotiating collective agreements, here, providing notice of plant closings—employers have a legal duty that flows to the union in its representative capacity and to the union *alone*. In both instances, because of its exclusive role vis-a-vis the employer, the union is in a decidedly better position than the employees individually to protect the employees' interests where the employer breaches its legal duties.

For example, a union representative which has negotiated a collecive bargaining agreement may be aware of bargaining table interchanges that throw light on ambiguous terms of the agreement and indicate that the employees' rights are in fact being violated. Under the WARN Act, even more obviously, since only the union is entitled to statutory notice, only the union will be aware when notice is not supplied. Additionally, the key provisions of the WARN Act governing whether or not notice is due turn upon the impact of an employer decision on employees as a group. The union in its capacity as exclusive representative will normally be able to gauge that impact; any individual employee would find it difficult to do so. *See, e.g.*, 29 U.S.C. § 2101(a)(2) (notice required in the event of a plant closing only "if the shutdown results in an employment loss . . . during any 30-day period of 50 or more employees"); 29 U.S.C. § 2101 (a)(3) (notice required in the event of a mass layoff only if there is an employment loss during any 30-day period of either 33 percent of the employees and at least fifty employees or a total of 500 employees).

Finally, just as many cases brought on a collective bargaining agreement will involve common issues of contract interpretation affecting the employees as a group, it is also the case under the WARN Act that almost all of the substantial legal issues likely to arise in litigation—for example, whether the plant closing or mass layoff was "caused by circumstances not reasonably foreseeable at the time that notice would have been required" or whether "the employer reasonably believed in good faith that giving the notice required would have precluded the employer from obtaining . . . needed capital or business" (29 U.S.C. §§ 2102(b) & (e))—will be common to the affected employees as a group.

For all these reasons, Congress concluded that in the WARN Act, as in LMRA § 301, it would be "artificial and pointless to cut off [the union's] representative functions at the courthouse door." *United Federation of*

Postal Clerks v. Watson, 409 F.2d 462, 470 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1969) (citing *Hoosier Cardinal*).

In sum, the WARN Act provision authorizing unions as statutory representatives to bring suit in the event of a failure by the employer to provide the requisite statutory notice and to recover the monetary redress to aggrieved employees provided for on such a violation is well-adapted to the statutory scheme as a whole. The means by which "representatives" are chosen is governed by statute (the National Labor Relations Act and Railway Labor Act, incorporated by reference), and supervised by one of two governmental agencies (the National Labor Relations Board and National Mediation Board) and the representative once chosen is subject to a duty of fair representation. The union representatives that may sue to recover monetary payments for represented employees also represent those same employees for purposes both of determining their terms and conditions of employment and of enforcing those contractual rights through grievance/arbitration procedures and in court. The statutory liability questions are likely to be common to the represented employees as a whole, while the monetary sum payable to aggrieved employees is set through a purposely simplified calculation, rarely involving factual determinations individual to a single employee.

(C) With this understanding of the interrelated determinations Congress made in structuring the substantive and enforcement provisions of the WARN Act, we return to the three-fold inquiry into the standing question applicable in federal statutory cases we outlined at pp. 13-16, *supra*.

First, it could not be clearer that Congress specifically authorized unions acting as exclusive representatives to bring suit against employer violators of the WARN Act's notice requirements and to seek the redress provided by the Act in the form of monetary payments to the affected employees the union represents.

Second, because of this statutory grant of authority to litigate, the only pertinent standing limitations are those derived directly from Article III.

Third, the bedrock Article III requirement is that the litigant "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).[7] In this case, a focus on the statutory scheme alone is sufficient to determine that each aspect of the Article III standing minima is present in this case.

(1) Under the statute, Brown Shoe was obligated to provide notice to Local 751, at a certain time under certain circumstances. According to the complaint, Brown Shoe did not do so. By failing to fulfill a specific legal duty owed to the specific plaintiff, and to the plaintiff alone, Brown Shoe caused Local 751 a legal injury of the most traditional kind, albeit one that exists by virtue of the statute itself rather than the common law. And, the resultant legal dispute as crystallized in this lawsuit will certainly be presented in a factually discrete circumstance with defined consequences, rather than "in the rarified atmosphere of a debating society," *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982): The primary questions to be determined, aside from those of statutory interpretation, concern matters grounded in a specific time and place concerning a specific decision to close a specific plant and the specific manner in which the closure was accomplished. As the party which should have received proper notice but assertedly did not, it is the union as the

[7] As we develop later, the oft-repeated statement that to support Article III standing the injury must be to the plaintiff *herself* does not pretend to completeness. The federal judicial power has always reached a large variety of cases in which the litigant is not the injured person herself but a person regarded as legally identical to the injured person for purposes of the lawsuit in question.

affected employees' representative, and not the employees acting independently of the union, that is in the best position to present such a case to the court with the requisite "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The instant case, in other words, is at the other end of the spectrum from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the *only* case in which this Court has invalidated a Congressional grant to a plaintiff of standing to sue as contrary to the Article III standing criteria. In *Lujan*, because the statute permitted *any citizen* to sue, "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the . . . laws" (*id.* at 573), the Court determined that the statute exceeded the "outer limit to the power of Congress to confer rights of action," (*id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Further, the statute in question in *Lujan* did not in terms create any legal duty owing to any specific citizen but only created a right in all citizens to sue. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).[8] And, third, as the *Lujan* Court emphasized, reading Article III as permitting Congress to authorize the citizenry at large to sue over *government decisions* would undermine the constitutionally mandated separation of the Legislative Branch from the Executive Branch which is maintained, in part, through Article III's limitation of the judicial power to "cases or controversies." *Id.* at 577 ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right'

[8] The concurring opinion in *Lujan* was careful to note that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before" and did not "read the Court's opinion to suggest a contrary view." *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed. Art. II, § 3."); *see also id.* at 580 (suggesting that even the "outer limits" on congressional authority to create causes of action may only apply in "suits against the government").

In contrast, as we have stressed, the WARN Act creates a specific legal duty running from the employer-defendant in particular to the union-plaintiff in particular. And, in a statute governing the relationship between two private parties, Congressional determinations concerning the enforcement of statutory obligations raise none of the concerns that animated *Lujan* regarding the legislative usurpation of executive authority through expansion of the judicial role to determine public disputes.

(2) It is also ascertainable, from the statute itself and from the allegations of a statutory violation contained in the complaint, that it was the defendant, Brown Shoe, that directly "caused" the plaintiff, Local 751, legal injury. It was Brown Shoe that had a statutory duty to provide the notice, Local 751 that had a right to receive notice, and the complaint alleges that Brown Shoe did not provide notice.

(3) The remaining question, then, is posed by the "redressibility" aspect of this Court's constitutional standing jurisprudence. That question arises by reason of the fact that the monetary payments the WARN Act authorizes as the sole remedy for the violation alleged and that the union seeks will not ultimately go to the union treasury but to the employees whose interests the notice right serves to protect and that the union is charged with advancing.

The standing cases turning on the redressibility issue have involved a narrow range of strikingly similar situations. In each, plaintiffs—acting without any specific Congressional authority—have sought injunctive relief against governmental enforcement actions pertaining to third parties. And, these plaintiffs have sought to justify their lawsuit by contending that the third parties might behave differently in a manner benefitting the plaintiffs if the government changed its enforcement program. *Allen v. Wright, supra; Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976); *Linda R.S. v. Richard D., supra.* As the last of these cases makes explicit, the denial of standing on the basis that the relief requested might not redress the plaintiff's injury was generated by the same consideration that was decisive in *Lujan*—that judicial decision of suits of this kind would be a usurpation by the judiciary of governmental decision-making entrusted to the legislature and the executive. *Allen v. Wright, supra,* 468 U.S. at 761 ("the idea of separation of powers . . . counsels against recognizing standing in a case brought, not to enforce specific legal obligations . . . but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.")

Further, while redressibility is part of the Article III standing jurisprudence, it is worthy of note that this Court has *never* overridden an explicit statutory or traditional common law cause of action on the basis that the statute does not provide appropriate redress to A for the legal injury to A's interests underlying the case of action. In large part, we submit, that legal result follows from the inherent complexity of remedial issues and the resulting breadth of the constitutional authority of legislatures and common law courts to create remedial schemes to vindicate legal rights and to correct legal injuries.

The choice of a form of relief to "redress" a particular injury depends upon practical considerations very much the province of legislatures and common law courts. In one sense, for example, a damages award never "redresses" a plaintiff's injury directly. Compensatory damages do not

restore a severed leg or reverse the pain caused by the injury. Nor does such an award necessarily induce the particular wrongdoer who caused the injury to fulfill his duty of care toward the plaintiff, either retrospectively or in the future. Thus the form and nature of monetary remedies for a wrong is the product of a societal judgment on how to further a set of interests which include those of the plaintiff and those of society at large in deterring similar conduct in the future. How those interests are to be furthered depends on the nature and the purpose of the particular right and on the overall legal scheme of which that right is but one part.

That being so, the law has never limited monetary remedies for the defendant's failure to perform a legal duty due to the plaintiff to remedies that flow to the plaintiff herself, and not to other individuals in whose well-being the plaintiff has a legally-recognized interest. Rather, courts and legislatures have appreciated that where a duty owed to one person is intended at least in part to aid that person in forwarding another individual's (or individuals') welfare, the failure of a defendant to perform the duty owed is best vindicated by judicial relief that flows to the beneficiary rather than to the holder of the legal right.

The most obvious of these circumstances, and the most venerable, is the enforcement of third-party beneficiary contracts, in which A agrees with B to provide some benefit to C. As the holder of the legal right, B has always been understood to have a cause of action to enforce the agreement:

> The promisee of a promise for the benefit of a beneficiary has the same right to performance as any other promisee . . . If the promisee has no economic interest in the performance, as in many cases involving gift promises, the ordinary remedy of damages for breach of contract is an inadequate remedy. . . . In such cases specific performance is commonly available. . . . [Restatement (Second) of Contracts § 305 (1979).]

See also id. at § 307, Comment a; 4 *Corbin on Contracts* § 812 at 243-44 (1951) (promisee can sometimes sue as an imputed trustee to recover monetary damages on behalf of the third party beneficiary). The debated question, indeed, has not been whether the promisee can sue to require the promisor to pay the third party beneficiary but whether or not C, the beneficiary, can sue. *See generally* 4 Corbin § 772 (difficulties surrounding enforcement of third party rights); Restatement (Second) of Contracts §§ 304, 309, 310 (rights of a third party beneficiary); Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1109 (1985).

The third party beneficiary cases are sufficient to demonstrate that cases in the form of the instant case have been "historically viewed as capable of resolution through the judicial process." *Flast supra*, 392 U.S. at 95. For those cases show that B's demonstrated interest in the welfare of C when conjoined with B's interest in vindicating her own legal rights provide the necessary assurance that the "questions [will be] presented in an adversary context." *Id.*, at 95.

There is, moreover, a second set of long recognized judicial cases similar in structure to this case—and to the third party beneficiary cases—created by the federal statutes in which government entities are granted litigating authority to sue one private party for violation of statutory obligations owed to another private party (or group of parties) and to obtain relief which at least in part provides individualized monetary payments to the latter. For example, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), the Equal Employment Opportunity Commission may sue for "specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimi-

nation victims." *General Telephone Co. of the Northwest v. EEOC supra*, 446 U.S. at 326. *See also, e.g., Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (Secretary of Labor permitted, as statute provides, to pursue claims for monetary relief for individuals for violation of the Fair Labor Standards Act); ERISA, 29 U.S.C. § 1132(a)(2) (granting the Secretary of Labor the power to sue for violation of ERISA). The governmental entity in such cases "is not merely a proxy for the victims of discrimination, and the EEOC's enforcement suits should not be considered representative actions." *General Telephone, supra*, 446 U.S. at 326. Rather, the EEOC—and agencies bringing similar cases pursuant to statutory provisions—are acting "to vindicate the public interest." *Id.; see also Riddle v. Cerro Wire & Cable Group*, 902 F.2d 918, 921-22 (11th Cir. 1990) (suit brought by EEOC is not necessarily res judicata as to interests of the individual discriminatees, because EEOC and individual do not share the same interests in the litigation.)

At the same time—and, as is true in the third party beneficiary cases—the EEOC, the Secretary of Labor, or other government entity acts to vindicate a right whose very purpose is to forward the rights and interests of the specific individuals the defendant has injured in a specific way through the defendant's specific violations alleged in the complaint. That being so, in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co., supra*, 115 S. Ct. at 1286, this Court recognized that remedial schemes of this kind, in which a plaintiff government entity pursues its own legal interest in court and in the course of so doing generates individualized judicial monetary relief that flows to such specifically injured third parties, are consistent with Article III standing principles.

There is, of course, yet a third apt analogy. As we have noted, the closest analogue to the WARN Act statu-

tory scheme—and to the role of the union representative in that scheme—is the LMRA § 301's litgiation authorization to unions that are parties to collective bargaining agreements to sue for monetary relief for lost wages and benefits for represented employees recognized in *Hoosier Cardinal*. See pp. 24-27, *supra*.

It is true, of course, that here the union's right is statutory rather than contractual. But the distinction between a defendant's violation of self-created norms and a defendant's violation of Congressionally-created norms is of no moment to standing analysis. In both instances the union *itself* has suffered a legal injury in its role as exclusive representative—there, by reason of an employer's failure to abide by the collective bargaining agreement's terms, here by reason of the employer's failure to give notice due to the union as the employee's representative. There is nothing of pertinence that suggests that it is more appropriate in one instance than in the other to permit a union that has in fact suffered a cognizable legal injury to vindicate its legal right and to do so through a remedy that forwards the employment-related interests of the represented employees.

The upshot of this analysis is that where there is a common law or statutory legal duty owed to the plaintiff which will, if carried out, enable the plaintiff to act on its legally recognized interest in furthering a third party's welfare, and where that duty has been breached, an otherwise appropriate plaintiff can pursue relief, monetary, individualized, or otherwise, which redounds to the financial benefit of the third party. Put another way, in such situations, given the precise nature of the plaintiff's legal right and of the concrete legal duty owed by the defendant to the plaintiff, and the consequent legal injury caused by the defendant's violation, monetary relief for the benefit of third parties *will* redress the plaintiff's legal injury. The plaintiff thus has Article III standing to bring and prosecute the lawsuit.

II. The Plaintiff Union Has Article III Standing To Bring This WARN Act Suit For The Employer's Failure To Provide A Plant Closing Notice By Reason Of Its Statutory Designation As The Representative Of The Adversely Affected Employees For This Purpose.

The Eighth Circuit entirely ignored the point that forms the basis for the standing argument we have just developed—that the plaintiff union is the holder of the legal right the defendant employer is alleged to have violated here—and instead treated this case as if the affected employees were the rightholders and as if the union were bringing this suit as a voluntary membership association. And, on that view, the Eighth Circuit took it that the union did not have standing because the union had not *itself* suffered a concrete legal injury, and because Article III requires that a federal court plaintiff suffer such an injury.

A. The Eighth Circuit's understanding of Article III is wrong in its own terms. In fact, in a

> variety of circumstances, both traditional and modern, a party is permitted to appear in court as a formal representative of other interests. Trustees, guardians and personal representatives are familiar examples. [Wright, Miller & Cooper, 13 *Federal Practice & Procedure* § 3531.9 at 627 (West 1984).]

See also Matter of Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1319 (7th Cir. 1992) ("representative damages litigation is common—from class actions under Fed. R. Civ. P. 23(b)(3) to suits by trustees representing hundreds of creditors in bankruptcy to *parens patriae* actions by state governments to litigation by and against executors of decedents' estates.")[9]

[9] A small sampling of such cases in this Court includes: *Reiter v. Cooper*, 507 U.S. 258 (1993) (bankruptcy trustee); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (executor); *United States v. Clark*, 445 U.S. 23 (1980) (guardian on behalf of children); *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980) (trustee);

We recognize, of course, that the Eighth Circuit relied on Article III standing cases—none of which involved a representative designated by statute or recognized at the common law—that summarize the "injury in fact" requirement through some form of the phrase "*personal* stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. at 186 (emphasis supplied).[10] But, from the first, this

Robertson v. Wegmann, 436 U.S. 584 (1978) (executor); *Van Dusen v. Barrack*, 376 U.S. 612, 614 (1964) (personal representatives in wrongful death action) *Hanson v. Denckla*, 357 U.S. 235 (1958) (executor); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 310 (1950) (guardian of trust); *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.*, 333 U.S. 821 (1948) (administrator in FELA wrongful death action, 45 U.S.C. § 51); *Bullard v. City of Cisco, Texas*, 290 U.S. 179 (1933) (trustee); *Mecom v. Fitzimmons Drilling Co.*, 284 U.S. 183 (1931) (administrator); *Pendleton v. Benner Line*, 246 U.S. 353 (1918) (bailee); *Mexican Central Railway Co. v. Eckman*, 187 U.S. 429 (1903) (guardian); *The Beaconsfield*, 158 U.S. 303 (1895) (bailee); *Dodge v. Tulleys*, 144 U.S. 451 456 (1892) (trustee; "whether one or many [beneficiaries], the trustee represents them all, and in his name the litigation is generally and properly carried on."); *The Mamie*, 105 U.S. (15 Otto) 773 (1881) (personal representative); *Dennick v. Ry. Company*, 103 U.S. (13 Otto) 11, 19-21 (1880) (capacity of administrator in wrongful death action determined by state law); *The Thames*, 81 U.S. (14 Wall.) 98 (1871) (in admiralty agent may sue to recover for damage to absent principal's cargo); *Chappedelaine v. Dechenaux*, 8 U.S. (4 Cranch) 306, 308 (1808) (trustee); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (administrators of estate). *See also* 28 U.S.C. §§ 754, 959 (authorizing appointment of receivers); 45 U.S.C. § 51 and 46 U.S.C. §§ 688, 761 (authorizing wrongful death action by personal representative, for benefit of specified heirs).

These familiar examples are far from exhausting the list. *See, e.g., In re Oil Spill by the Amoco Cadiz, supra*, 954 F.2d at 1319-20 (7th Cir. 1992) (French trade syndicates may sue in federal court for damages on behalf of their members, where authorized to do so by law of France); *The Bello Corrunes*, 19 U.S. (6 Wheat.) 152 (1921) (foreign consul may represent citizens of that country in U.S. litigation).

[10] *See, e.g., Valley Forge Chistian College v. Americans United for Separation of Church & State, supra*, 454 U.S. at 758, *quoting*

Court's more complete articulation of the applicable principle has recognized a role for properly designated representatives:

> *Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another,* he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury to himself, as distinguished from the great body of his fellow citizens [*Tyler v. Judges of the Court of Registration,* 179 U.S. 405, 406 (1900), emphasis supplied.] [11]

Gladstone Realtors v. Village of Bellwood, supra, 441 U.S. at 99 (plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"); *Lujan v. Defenders of Wildlife, supra,* 504 U.S. at 573, *quoting Sierra Club v. Morton, supra,* 405 U.S. at 734-35 ("the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."); *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 38 (standing question is "whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."); *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 395-97 (1980).

[11] Even where the purported representative has "no particular entitlement to stand in the shoes of the represented party" (*Matter of Oil Spill by the Amoco Cadiz, supra,* 954 F.2d at 1319), there are situations in which this Court has permitted representational litigation. One of those situations is defined and delimited in the associational standing doctrine. *See* pp. 43-46 *infra.* Another is the common law "next friend" doctrine, by which an individual not authorized by any legislative or judicial act steps forward to litigate on behalf of a third party who has not expressly authorized the representation. This Court *has* recognized that such individuals *without* a direct stake in the outcome of a case can, consistent with Article III, bring suit if there are strong practical reasons to allow them to do so (the inability of the affected individual to represent herself) and some assurance that the "next friend" will advance the best interests of the party being represented (true dedication to the best interests of the represented person and a pre-

B. This long and ancient authorized-representative-plaintiff line of cases is entirely consistent with Article III standing jurisprudence. The standing inquiry at bottom, as we noted at the outset, rests on the lessons drawn from the classes of cases that have "a form historically viewed as capable of resolution through the judicial process." *Flast, supra,* 392 U.S. at 95.

That being so, the inquiry must begin from the actual historical practice—which, as characterized by the *Tyler* case nearly one hundred years ago, has been and remains that "the plaintiff is permitted to sue for the benefit of another" if authorized "by statute or the settled practice of the courts." The continuing vitality of this understanding is perhaps best illustrated by Fed. R. Civ. P. 17, which expressly provides that "[a]n executor, administrator, guardian, bailee, trustee of an express trust . . . or *a party authorized by statute* may sue in that person's own name without joining the party for whose benefit the action is brought . . ." (emphasis added).

Equally to the point, in such instances the lesson of history is that the case *is* presented in a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College, supra,* 454 U.S. at 472.[12] The circumstances of the

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existing, generally familial, relationship). *Compare, Whitmore v. Arkansas,* 495 U.S. 149 (1990) (plaintiff not entitled to act as "next friend" where prisoner was competent to represent himself, and putative "next friend" had no prior relationship to prisoner) *with Bradley v. Harrelson,* 151 F.R.D. 422 (M.D. Ala. 1993) (father could represent his mentally disabled son as a "next friend" plaintiff).

[12] As noted previously, cases such as this one (and the vast majority of authorized representative situations) do not implicate the other major theme of contemporary standing law, the "relationship[] between the coequal arms of the National Government." *Valley Forge Christian College supra,* 454 U.S. at 483.

represented individual supply that necessary detail and realism, so that "a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Id.* Thus, once it has been determined as a question of nonconstitutional common or statutory law that A is a properly authorized representative of B, the federal courts have regarded A's interests as identical with B's. And, the constitutional standing inquiry then focuses upon whether the *represented* individual—or real party in interest—has suffered the requisite injury in fact to meet the standing concern with "concrete adverseness". *Baker v. Carr, supra,* 369 U.S. at 204. *Compare McClure v. Carter,* 513 F. Supp. 265 (D. Idaho), *aff'd per curiam,* 454 U.S. 1025 (1981) (Congress' authorization of Senator to bring suit to challenge appointment of judge did not create standing where the Senator himself had no concrete interest and was not the designated representative of anyone who had such an interest).[13]

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[13] Courts have, indeed, generally recognized that where one individual purports to be the properly designated representative for litigation purposes of another individual or individuals, only the situation of the represented individuals need be considered in determining the requisite factual concreteness issue in the standing analysis; the question whether the particular representative is properly authorized is regarded as the separate question of capacity. *Firestone v. Galbreath,* 976 F.2d 279, 283 (6th Cir. 1992) ("Frequently, attorneys and courts confuse the concepts of standing with that of capacity to sue and with the real party in interest principle. . . . According to the Complaint, the Estate could trace a direct injury to the alleged acts of the defendants. The question is whether these plaintiffs can sue on behalf of the Estate. This would seem to be a question of capacity rather than standing . . . ."); *Glickstein v. Sun Bank/Miami, N.A.,* 922 F.2d 666, 670 (11th Cir. 1991) ("The question in this case is whether Howard Glickstein is able to bring this case on behalf of the estate. This is not a question of standing; rather, this issue involves the question of whether Glickstein has the capacity to bring this action on behalf of the estate.")

The form and nature of authorized representative litigation also serves to satisfy the two remaining concerns of the standing law—preserving the autonomy of affected persons (*Valley Forge Christian College, supra,* 454 U.S. at 473), and promoting the adversarial presentation of the dispute (*Flast, supra,* 392 U.S. at 97).

The putative representative is not just any mere "concerned bystander[]." *United States v. SCRAP,* 412 U.S. 669, 687 (1973). He or she either has been directly selected as a suitable representative by some official process, or meets officially-promulgated criteria, or has been appointed by the putative beneficiary himself or herself. *See* 18 Wright, Miller & Cooper, Federal Practice & Procedure, Jurisdiction § 4454, at p. 460 (1981) ("[a] mere self-appointed volunteer cannot usurp authority to bind anyone else by litigation. Representative capacity must be established instead by private or public appointment.")

Further, in these instances the representative typically has some concomitant legal *duty* to forward the interests of the party being represented, imposed by statute, contract, or common law. *See, e.g.,* Restatement (Second) of Trusts, § 174 (trustee has duty to use "such care and skill as a man of ordinary prudence would exercise in dealing with his own property"), § 177 (enforcement of actions), § 178 (defense of actions), § 192 (compromise of claims).[14]

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[14] *Hodel v. Irving,* 481 U.S. 704 (1987) well illustrates how ingrained is the judicial understanding that litigation through properly authorized representatives does not create Article III standings problems of any substance, while representational litigation by individuals who are *self-appointed* to protect the interests of others does require close Article III analysis. In *Hodel,* the Court, without comment, permitted plaintiffs to "represent" heirs or devisees of Indian decedents. 481 U.S. at 709-710 (emphasis supplied) (plaintiffs "are or represent" heirs or devisees; "[b]ut for [the contested statute] this property would have passed . . . to appellees or *those they represent.*") The Court then went on to discuss at length, although the question was not contested,

C. For reasons already largely canvassed, this case falls squarely within this traditional category of authorized representative cases. *See* pp. 36-41, *supra*. Here, "the union is no mere volunteer whose representation of others must be checked for adequacy. . . . The union has already been certified by a neutral government agency as the 'exclusive representative' of the bargaining unit employees." *Local 2 v. FDIC*, *supra*, 962 F.2d at 67 (citation omitted). And, as we have noted, the union in carrying out its representational functions is bound by "the duty of fair representation . . . akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots Ass'n v. O'Neil*, *supra*, 499 U.S. at 74. Based on this authorization and the relationship created thereby, Congress in the WARN Act made its determination to specifically authorize the union, as exclusive representative, to bring this kind of suit.

In sum, even on the Eighth Circuit's view of this case as one fundamentally concerning the rights of the employees individually to monetary relief rather than as one involving an obligation owed to the employees' representative, the case still involves a traditional "case or controversy" and a traditional adversary relationship, so that the employees being represented would have had Article III standing to sue. And, as the court below itself recognized, the union is authorized by the WARN Act to act in a representative capacity on behalf of the employees. That

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whether or not the plaintiffs could rely on the constitutional interests of the decedents in litigating their case. 481 U.S. at 711 *et seq.* That perceived standing problem arose because the usual common law solution to litigating on behalf of a deceased person, official appointment of an executor, was not available in the particular circumstances (since the decedent was an Indian, as to whom the Secretary of the Interior ordinarily pursues surviving claims). It was a group of individuals' self-appointment without any official authority to forward the decedents' rights that required extended consideration, although those individuals were held to have standing in the end. 481 U.S. at 711-12.

being so, the union has Article III standing to bring this case.

D. Ignoring all of the relevant law regarding authorized representatives, however, the Eighth Circuit analyzed this case as one that fits the set of cases in this Court dealt with whether, and under what circumstances, associations with *no* statutory or common law authority to do so may litigate on behalf of their members. The Eighth Circuit thereby confused a subset of representational litigation for the whole.

The associational standing cases such as *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) and *International Union, UAW v. Brock*, 477 U.S. 274, 281 (1986) on which the court below relied cover only one small part of the representational standing law.[15] In the *Hunt* class of cases, there are *no* established standards or procedures, common law or statutory, for designating the plaintiff association as the representative of the association's members for purposes of litigation, nor any assurance of adequate associational representation other than whatever such assurances are provided by the association's internal governing documents. Consequently, the question addressed by the associational standing cases is whether such authority to litigate on behalf of others should be *implied* from the voluntary relationship between the association and its members, and if so under what circumstances.[16]

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[15] While *UAW v. Brock* involved representation by a union, the statute under which suit was brought did not address the question whether the union was authorized to bring suit.

[16] As noted (n.11, *supra*), the "next friend" cases raise a similar problem of devising limitations on volunteer representation of a third party's interests. The difference is that in the "next friend" situation the Court had a body of common law precedents to draw upon, while in the associational situation there were no such precedents and the Court was required to proceed on its own in developing criteria over time.

Hunt crystalizes the associational standing inquiry through a three-part judicially-created standard to fill the resulting void:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. [432 U.S. at 343.]

The Eighth Circuit's conclusion that the union here lacks standing, rested on the third prong of the *Hunt* standard. Because individual monetary damages were being sought, the court below concluded, "the relief requested requires the participation of individual members in the lawsuit." *Hunt,* 432 U.S. at 343, cited at Pet. App. 9a.[17]

The first *Hunt* requirement—which assures that there is the requisite concrete injury to the beneficiary, so that the case is one in which the judicial power can be exercised with sufficient focus and specificity—is, to be sure, part of the constitutional standing inquiry, and applies, as we have seen, in all representational cases. See pp. 39-40, *supra.* The second two associational standing criteria, however, have no independent role where "by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another." *Tyler v. Judges of the Court of Registration, supra,* 179 U.S. at 406.

The second "germaneness" prong ascertains whether it is appropriate to regard the organization as a surrogate

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[17] Although there is no need to address the question, it is our position that, given the simplified nature of the monetary relief here provided, this third *Hunt* prong is in any event met here. *See* pp. 19-23, *supra.*

for the injured individual in forwarding the individual's interests, by probing the identity of interest between the association and its members. Where this question is addressed instead by the common law or by statutory criteria regarding the appointment of an authorized representative, there is nothing in the Constitution that suggests—much less requires—that the federal courts are to make a second independent determination. Here, for example, the statutory materials determine how the representative is chosen (through a free and fair majority determination of all affected employees), and specify the scope of the representative's authority (collective bargaining and related matters under the NLRA and RLA, as well as protecting employees' interests under WARN.) There is simply no legal void for the *Hunt* "germaneness" determination to fill.

The third "individual participation" requirement is essentially one relating to efficient judicial management of a volunteer associational suit. In the *absence* of Congressional or other authorization of the representative, this Court has sought to take account of the represented party's autonomy interest and of the adversariness interest by asking whether a given *self-appointed* associational representative is sufficiently responsive to the interests of individual members, and whether the interests of the individuals in the group are diverse or conflicting. Where there has been a statutory or a common law authorization, however, not only have such concerns been addressed, but there is typically, as here, a concomitant assurance of fair representation not present in the pure associational cases.

In short, only the first *Hunt* prong is a constitutional, Article III requirement, applicable in every form of representational case. And, there is no dispute that this *Hunt* requirement is satisfied here. The other two aspects of the *Hunt* litany are applicable only where the association in question has "no particular entitlement to stand in the shoes of [its] members" (*Matter of Oil Spill by the*

Amoco Cadiz, supra, 954 F.2d at 1319), and is relying instead on a voluntary relationship with its members to supply that authority. That is not the situation here. And, those aspects of *Hunt* have no application where the suit is brought by a representative designated by a federal statute.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed and the case should be remanded for determination of the merits.

Respectfully submitted,

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